

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Joint Petition for Expedited Rulemaking) RM-10865
Concerning the Communications Assistance)
for Law Enforcement Act.)

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES**

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I. Introduction

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ submits these reply comments on Law Enforcement’s Joint Petition for Expedited Rulemaking Concerning the Communications Assistance for Law Enforcement Act (“CALEA”)² in response to the Public Notice (“Notice”) released on March 12, 2004, in the above-captioned proceeding. NASUCA’s reply comments are limited to the issue of cost recovery raised in the March 10, 2004, joint petition and, in with regard to that issue, NASUCA generally opposes the joint petition.

II. Reply Comments.

In their March 10, 2004, petition, the United States Department of Justice, the Federal Bureau of Investigation and the Drug Enforcement Administration (collectively, “Law Enforcement”), ask the Commission to “confirm” that carriers bear the sole cost of implementing CALEA solutions for post-January 1, 1995, equipment, facilities and services.³ In support of their request, Law Enforcement blithely suggests that such action “will not burden residential ratepayers” citing a prior Commission observation that the carriers’ costs would be “shared by all

¹ NASUCA is a non-profit, national association of 42 consumer advocates in 40 states and the District of Columbia, organized in 1979. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. NASUCA members operate independently from state utility commissions, primarily as advocates for residential ratepayers, although some members also represent small business ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

² Pub. L. No. 103-414, 108 Stat. 4279 (1994), *codified at* 47 U.S.C. §§ 1001-10 and 47 U.S.C. § 229.

³ *Joint Petition*, p. 64.

ratepayers and, therefore, would be significantly diluted on an individual residential ratepayer basis.”⁴ Law Enforcement also requests that the Commission essentially reconsider, and reverse, its prior determination that carriers can recover their capital costs of CALEA from law enforcement agencies in the interception fees the carriers charge these agencies.⁵ NASUCA joins with the various parties which submitted comments opposing Law Enforcement’s efforts in both respects.

A. NASUCA Generally Opposes Authorization of Yet More Carrier Line Item Charges and Fees.

As an initial matter, NASUCA is generally opposed to the concept of the Commission authorizing carriers to tack yet another line item surcharge or fee on consumers’ monthly phone bills. As the Commission is aware, NASUCA filed a petition for a declaratory ruling asking the Commission to prohibit such monthly surcharges and fees unless specifically required by federal, state or local regulatory action.⁶ Moreover, even where such line items are mandated by government, NASUCA asks that carriers’ fees and surcharges be limited to no more than the amount required by regulatory action.

As NASUCA made quite clear in its petition, consumers have been subjected to an ever-increasing panoply of “regulatory recover fees,” etc. that appear on their monthly bills and that significantly drive up their anticipated costs of service over and above what they expected based

⁴ *Id.*, pp. 65-66, citing *I/M/O Communications Assistance for Law Enforcement Act*, Order on Remand, CC Docket No. 97-213, FCC 02-108, ¶ 65 (rel. April 11, 2002) (“*CALEA Remand Order*”).

⁵ *Id.*, p. 69.

⁶ See *I/M/O Truth-in-Billing and Billing Format*, National Association of State Utility Consumer Advocates’ Petition for Declaratory Ruling, CC Docket 98-170 (filed March 30, 2004). The Commission has not yet issued a public notice requesting comment on NASUCA’s petition. However, NASUCA anticipates the issuance of that notice in the near future.

on carriers' advertised rates and services. Giving carriers the "green light" to stick it to consumers yet again, as Law Enforcement advocates, is neither appropriate nor reasonable. Law Enforcement's request should therefore be firmly rejected by the Commission, at least in the absence of a substantially more developed factual record or a final decision on NASUCA's petition for declaratory ruling.

B. NASUCA Opposes Law Enforcement's Petition on Grounds Specific to CALEA.

Beyond its general opposition to carrier line item surcharges and fees, NASUCA believes that CALEA provisions and Commission decisions that put much of the burden for paying for CALEA compliance on law enforcement agencies rather than ratepayers warrant rejecting Law Enforcement's petition. NASUCA noted two of the cost recovery mechanisms provided for under CALEA in its March 30, 2004, petition for declaratory ruling, namely: (1) payment by Law Enforcement for carriers' costs of making pre-January 1, 1995, facilities, equipment and services CALEA-compliant; and (2) payment by Law Enforcement for a carrier's costs of making post-January 1, 1995, facilities, equipment and services CALEA-compliant if the Commission determines that compliance with the assistance capability requirements of Section 1002 of CALEA is not "reasonably achievable."⁷ Under both of these mechanisms, law enforcement agencies are entirely responsible for paying the costs of CALEA compliance.

Numerous parties identified a third mechanism whereby carriers' CALEA-compliance costs are recovered from law enforcement agencies rather than ratepayers. The Commission's *CALEA Remand Order* is the source of this particular cost recovery mechanism. In that decision, the Commission determined that carriers may recover some of their capital costs in the intercept

⁷ *Id.*, pp. 55-56, *citing* 47 U.S.C. §§ 1008(a) & (b)(1) – (2).

fees the carriers charge Law Enforcement.⁸ NASUCA agrees with those parties which assert that Law Enforcement's effort to foreclose this mechanism as a means of carriers recovering their costs of bringing post-January 1, 1995, equipment, facilities and services into compliance with CALEA, is an improper attempt to have the Commission reconsider and overturn its decision in the *CALEA Remand Order*.⁹

NASUCA also agrees with commenters who assert that Law Enforcement's attempt to shift the costs of bringing equipment, etc. into compliance with CALEA entirely onto ratepayers is inconsistent with Congressional intent, particularly comments submitted by the United States Telecom Association ("USTA"). As USTA noted, Section 107(b)(3) of CALEA requires the Commission to "minimize the cost of such compliance" on consumers.¹⁰ Likewise, USTA notes that the relevant legislative history directs the Commission to be attentive to "the impact on rates for basic residential telephone service."¹¹ Similarly, as noted in NASUCA's March 30, 20004, petition for declaratory ruling, the Commission has noted that, in implementing Section 109 of CALEA, it should "seek to minimize any adverse effects of CALEA compliance on quality of service *and subscriber rates*."¹²

⁸ *CALEA Remand Order*, ¶ 60.

⁹ Obviously, a final cost-recovery mechanism, which NASUCA believes should be least preferred, is end user fees or surcharges.

¹⁰ *USTA Initial Comments*, p. 13, *citing* 47 U.S.C. § 1006(b)(3).

¹¹ *Id.*, Fn. 31.

¹² *NASUCA Petition*, p. 56, *citing In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, CC Docket No. 97-213, FCC 99-229, ¶ 41 (rel. Aug. 31, 1999).

In its petition, Law Enforcement characterizes as “minimal”¹³ the CALEA compliance costs for the equipment, facilities and services that are the subject of its petition. NASUCA finds itself in agreement with those parties which contest Law Enforcement’s assertion. USTA correctly noted that the Commission’s determination that “costs borne by the carriers and passed through to customers . . . would be significantly diluted on an individual residential ratepayer” because those costs are spread among a large rate base does *not* hold true for post-January 1, 1995, equipment compliance costs. As USTA observed, Law Enforcement has conceded that it is unable to pay manufacturers for 90% or more of software upgrades necessary to obtain compliance.¹⁴ NASUCA agrees that the costs of compliance are, indeed, likely to be substantial – not minimal – and this is a factor the Commission must consider.

Similarly, rural telecommunications carriers’ residential customers would likely be significantly affected by Law Enforcement’s proposal. As the National Telephone Cooperative Association (“NTCA”) and Concerned CALEA Compliant Carriers (“CCCC”) noted, if end users rather than law enforcement agencies are to pay for rural carriers’ CALEA-compliance costs rather than law enforcement agencies, those costs must be spread among a very small rate base indeed.¹⁵ NASUCA finds persuasive CCCC’s description¹⁶ of problems associated with vendors which provide the CALEA-compliant software and the difficulty small, rural carriers will experience in developing “non-standardized CALEA solutions.” At the very least, the Commission must carefully consider the impact of Law Enforcement’s proposals on customers

¹³ *Law Enforcement Petition*, p. 65.

¹⁴ *USTA Initial Comments*, p. 13, Fn. 33.

¹⁵ *NTCA Initial Comments*, pp. 4-5; *CCCC Initial Comments*, p. 4.

¹⁶ *CCCC Initial Comments*, pp. 2-4.

of small, rural carriers.¹⁷ These carriers' customers' basic telephone service is, in most instances, already subsidized by the Universal Service Fund. Moreover, many of these carriers receive few, if any, intercept requests from law enforcement agencies in the first place. Making their customers pay for ever more complicated bells and whistles is simply inappropriate.

Finally, NASUCA believes that Law Enforcement's lament about the dramatically rising costs of intercepts is a self-serving attempt to shift the Commission's focus from law enforcement agencies' own failure in holding down the costs of CALEA compliance. NASUCA agrees with the Cellular Telecommunications & Internet Association's ("CTIA") observation that much of the increased cost of intercepts is attributable to law enforcement agencies themselves. As the CTIA noted, the Commission required carriers to provide 24/7/365 security office coverage to assist law enforcement agencies, law enforcement agencies have not standardized their collection equipment forcing carriers to work with multiple vendors and provision multiple agencies.¹⁸ The Commission must, therefore, consider whether Law Enforcement has taken adequate measures to reduce the carriers' costs of CALEA-compliance before it rushes to authorize end user surcharges and fees.

NASUCA also urges the Commission to heed USTA's suggestion that Law Enforcement should seek Congress' assistance in obtaining funds necessary for future CALEA compliance, as well as the Electronic Frontier Forum's ("EFF") warning that the Commission should be wary of yet another unfunded mandate.¹⁹

¹⁷ NTCA suggested that the Commission must perform a Regulatory Flexibility Act analysis in its comments. *NTCA Initial Comments*, p. 5. NASUCA agrees such an analysis is required and should not be performed in the truncated, expedited rulemaking sought by Law Enforcement.

¹⁸ *CTIA Initial Comments*, pp. 25-26.

¹⁹ *USTA Initial Comments*, pp. 13-14; *EFF Initial Comments*, p. 3.

III. Conclusion.

For the foregoing reasons, the Commission should deny Law Enforcement's March 10, 2004, Joint Petition for Expedited Rulemaking.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2004, I caused a copy of the foregoing Reply Comments of the National Association of State Utility Consumer Advocates to be served upon all parties of record by First Class United State Mail, postage prepaid.

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